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FIRST APPEAL NO. 225 OF 1983

Date of Decision : 15.03.1996

For Approval & Signature

THE HON'BLE MR. JUSTICE N. J. PANDYA

AND

THE HON'BLE MR. JUSTICE A. R. DAVE

1. Whether reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder ?

5. Whether it is to be circulated to the Civil Judg...

Mr. J.M.Patel , learned Advocate for the Appellants

Mr. M.I. Patel , learned Advocate for Respondent No.1

Mr. Shailesh Brahmhatt, learned Advocate for Resp.No.2

CORAM : N.J.PANDYA & A.R DAVE, JJ.

15.3.1996

ORAL JUDGMENT ; (Per : Pandya, J)

Looking to the deposition of the main witness for the

defendant at exh.128 in Spl.Civil Suit No. 97/77 of learned 2nd Jt. Civil Judge (S.D.) Mehsana and particularly para-4 of that deposition, so far as the suit transaction is concerned, there is no dispute with regard to sum of Rs. 1,48,791.50 ps. The only dispute is that when goods were purchased on 11.11.1976, according to the defendants, it was at the rate of Rs. 46.00 per 20 kg. while according to the plaintiff it was at the rate of Rs.56.91 ps. per 20 kg. In the said para no.4, witness for the defendant refers to this admitted position and stated that it relates to difference of price of remaining amount i.e. Rs. 10.96 per 20 Kg.

However, this is also not possible to accept because of cross-examination of this very witness at paras 19 & 20 at pages 15 & 16.

So-called telephonic transaction was never got confirmed in writing by letter or in any other manner. On the contrary, in para-20, it has been clearly admitted that the bill dated 20.1.1977 i.e. the suit bill has been debited in their own books of account and that till filing of the suit, it was not objected to the same charging additional amount of Rs. 10.96. It is an admitted position as stated in para-19 that the goods were received from 7.12.1976 onwards in different lots and right from the receipt of the first lot, they had never objected to the said hiked up price to the tune of Rs. 10.91 per 20 Kg.

The Trial Court, in our opinion, has correctly appreciated the controversy between the parties and, therefore, has held against the defendants with regard to the said dispute as to the price difference.

Learned Advocate Shri J.M. Patel appearing for the appellants had thereafter concentrated on the amount claimed by way of interest. The plaintiffs respondents have prayed in their plaint interest at the rate of 18% p.a. and trial court has granted the interest at the same rate. The submission of Mr. Patel is that if at all mercantile practice is to be adhered to, this would not be the rate of interest in the year 1976 when the suit contract was entered in to between the parties.

In view of the said defence of oral purchase, according to the defendants, there is nothing in writing and, therefore, they have cross-examined plaintiff's witness extensively with regard to absence of contract as to the payment of interest. On going through the record, it is clear that interest is claimed on the basis of mercantile practice. That is the stand taken by the plaintiff's witness Manibhai also in is examination-in-chief para-3 wherein he has clearly stated so.

However, in this regard, again witness for the defendant

namely Gordhan Rana exh.128 in para-21 at page 67 has clearly stated that they are aware as to the amount of interest being debited in their account, they had received statement of account also, and they had never objected to the said amount being debited from time to time.

Thus it seems that the most of the part of the transaction is admitted except the said difference as to additional amount of Rs. 10.91. On the balance of probability, when the learned trial court has held in favour of the plaintiff, we would not disturb the same.

It was the learned trial Judge who had an opportunity while recording evidence, of getting personal feelings as to the truth of the matter, nature of the dispute involved between the parties, manner in which the dispute was raised and sought to be substantiated and particularly that peculiar atmosphere which prevails in a trial court room. While recording evidence of witness in the open court where learned Judge while reducing the testimony to writing will also be in the special advantageous position of getting the theme of the testimony and the manner in which witness would answer a question with particular emphasis at that time, lack of it, intonation and manner of answering the question as well as the time taken for answering the question. In other words, entire procedure of recording of evidence will afford unique opportunity to the trial court Judge for getting impression about the correctness or otherwise of the stand taken by a particular witness or party, would certainly go in to the conclusion recorded by him in his judgment.

From the aforesaid material on record, it can never be said that the learned Trial Judge could not have drawn the conclusion which he has drawn on the application of principle of probability and that appears to be the correct conclusion. There is no reason for us to disturb the same.

In the suit bill, as has been rightly pointed out by the learned Advocate Shri J.M. Patel that there is an endorsement said to have been made on 20.1.1977 to the effect that the price fixed was Rs. 46/ per 20 kg. and, therefore, money under the bill is not to be paid till it is settled, in our opinion, will not carry the case of the appellant further.

The reason is that the endorsement is made, but in view of the aforesaid admission in the cross-examination that the dispute was never raised till filing of the suit, the said endorsement would run counter to it. Moreover, this is a statement made by the party in his own interest and, therefore, its probative value has to be examined with utmost care and caution.

The trial Court, therefore, in our opinion, rightly held that this endorsement does not carry further and it was made subsequently with a view to come out of the liability. That conclusion of the trial court cannot be faulted with.

The net result, therefore, is that the appeal fails. The appeal is, therefore, dismissed with costs. Judgment and decree of the Trial Court is hereby confirmed.

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